

**Amanah Factors Sdn. Bhd. (Formerly known as
Chem Credit Sdn. Bhd) v. Polycom
Enterprise Sdn. Bhd. & 6 Ors.**

[1994] 1 CLJ

James Foong J.

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**AMANAH FACTORS SDN. BHD.
(FORMERLY KNOWN AS CHEM
CREDIT SDN. BHD)**

v.

**POLYCOM ENTERPRISE SDN. BHD.
& 6 ORS.**

HIGH COURT JOHOR BAHRU
DATO' JAMES FOONG J.
[CIVIL SUIT NO:23-260 OF 1988]
15 MAY 1993

FACTORING: Guarantors of factoring agreement sued - Facilities given to first defendants, who are now under receivership - Whether plaintiffs failed to exercise rights to repurchase debts - Whether first defendants breached any warranties.

This is an appeal by the guarantors (defendants 2-6) against final judgment granted by the SAR in an Order 14 application filed by the plaintiffs (P), a factoring company.

The first defendants (D1) obtained factoring facilities from P under a written agreement and D2-D6 stood as guarantors. P commenced action against the guarantors (D1 had gone into receivership) for the amount of MR349,851.52 alleged to be due and owing by D1 to them. The SAR allowed final judgment with interest and costs.

In the appeal before the learned Judge, the guarantors argued that:

a) P had failed to exercise their rights to repurchase the "Purchase Debts" which were assigned absolutely to P by D1 subsequent to the execution of the agreement.

b) P and D1 had executed an Invoice Discounting Agreement which substituted the terms of the factoring agreement; thus the variations would not bind the guarantors.

P replied that under the general clauses of the agreement, it was stated that no waiver or forbearance by P to D1 would exempt D1's liability to P; so P had full recourse against the Guarantors as they stand liable for debts owed to P by D1.

Held:

[1] The agreement declares that any or all debts owing to D1 by D1's customers may be

a offered for sale to P and upon acceptance, these debts become "Purchase Debts" which will then vest in P. The Court finds the Purchase Debts were legally assigned to P. In the event of non-recovery of the Purchase Debts by P from D1's customers, D1 must repurchase them from P by way of written notice from P to D1. No such written notice was tendered to D1. When there is no repurchase, the Purchase Debts remain the legal properties of P and D1 are not liable in any way in the event of non-recovery from D1's customers.

b [2] There is also no evidence to suggest D1 had breached any warranties or covenants. D1 are not obliged to reimburse P on the non-recovery of the purchase debts. Further, there appears to be no waiver or forbearance granted to D1 by P which in fact cannot have occurred since P did not exercise their legal right requesting D1 to repurchase the Purchase Debts.

c There are sufficient triable issues. As such, ground (b) put forward by the guarantors need not be considered at this stage.

d [Appeal allowed with costs].

Case referred to:

e *Citibank N.A. v. Ooi Boon Leong* [1981] 1 MLJ 282 (refd)

Legislation referred to:

Rules of the High Court 1980, O.14

f *For the appellants - Tan Meng Poo; M/s. Abdul Rahman Saad & Associates; L. Parthiban; M/s. L. Parthiban & Associates*

For the respondents - Viola L. Decruz; M/s. Liew & Co.

JUDGMENT

James Foong J:

g This is appeal against the decision of the learned Senior Assistant Registrar who allowed final judgment against the 2nd, 3rd, 4th, 5th and 6th defendants under an Order 14 application by the plaintiffs.

h The plaintiffs in this case is a factoring company which on the 13 May 1985 agreed to grant factoring facilities to the 1st defendants under a written agreement (this agreement I shall refer to as the Factoring Agreement). The 2nd, 3rd, 4th, 5th and 6th defendants are guarantors to the plaintiffs for all debts due and owing by the 1st defendants and of 1st defendants' due performance under the factoring Agreement.

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On 3 November 1987 the plaintiffs filed a writ of summons in this court against the 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th defendants for a sum of RM349,851.52 alleged to be due and owing by the 1st defendants to the plaintiffs. Subsequent to this, an application for summary judgment under Order 14 was filed by the plaintiffs against 2nd, 3rd, 4th, 5th and 6th defendants. On 16 July 1989 the learned Senior Assistant Registrar after hearing the application, allowed final judgment to be entered against the 2nd, 3rd, 4th, 5th, and 6th defendants for the sum of RM349,851.522 with interest and costs. This court was informed during this hearing that the 1st defendants are now under receivership.

The main contention of the 2nd to the 6th defendants' appeal is based mainly on 2 grounds. The first being that the 1st defendants are not liable to the plaintiffs for the sum as claimed for, the plaintiffs have failed to exercise their rights to repurchase the "Purchase Debts" which were assigned absolutely to the plaintiffs by the 1st defendants subsequent to the execution of the Factoring Agreement. The second, there being an "Invoice Discounting Agreement" executed between the plaintiffs and the 1st defendants which substituted the terms of the Factoring Agreement; such variations would not blind the 2nd to 6th defendants. Based on these two grounds, there exist triable issues which summary judgment should not have been granted.

The plaintiffs argued that the 2nd to 6th defendants as guarantors are jointly and severally liable for the debts owed by the 1st defendants as the plaintiffs have full recourse against the 1st defendants. Further, under clause 10 of the Factoring Agreement, a statement of accounts by the plaintiffs showing the indebtedness of the 1st defendants is sufficient and conclusive evidence of the amount due to the plaintiffs by the 1st defendants.

It was also contended by the plaintiffs that the 1st defendants had breached the warranties as contained in clause 12 of the Factoring Agreement thus, giving rise to a recourse against the 1st defendants for the sum of RM349,851.52 as claimed.

In addition to all these, the plaintiffs relied on the general clauses of the factoring agreement which provide that 'no forbearance or indul-

a gence' or 'any waiver' by the plaintiffs to the 1st defendants under the Factoring Agreement would exempt the 1st defendants from any liabilities to the plaintiffs.

b One would note that the contentions aforesaid are wholly based on the terms and conditions of the Factoring Agreement. For this, it is essential for this Court to examine the terms and conditions of the Factoring Agreement and the transactions that arose from it.

c Factoring, though can be said to be as old as commerce itself, has only of late begun to be more extensively used in our country. According to the concise Oxford Dictionary, "Factoring" is defined as buying at a discount the debts owed to another in order to profit by collecting them.

d Clause 1 of the Factoring Agreement, specifically states that the 1st defendants agreed to offer to sell to the plaintiffs upon the terms and conditions set out therein all debts from time to time owing to the 1st defendants by the 1st defendants' customers. In clause 2 of this agreement, the plaintiffs agreed that they may at their discretion accept any of these debts offered by the 1st defendants and upon such acceptance, these debts, which are defined as the 'Purchase Debts' shall vest in the plaintiffs.

e Clause 19 of the Factoring Agreement grants to the plaintiffs by the 1st defendants an irrevocable Power of Attorney to act, execute and, do all things in order to give full effect to the provisions of the Factoring Agreement.

f From the aforesaid provisions and reading other clauses in the Factoring Agreement as a whole, I find that the 'Purchase Debts' have been legally assigned by the 1st defendants to the plaintiffs. If these 'Purchase Debts' are legally assigned then, the plaintiffs would have to bear the risk of any non-recovery from the 1st defendants' customers. However if the plaintiffs wish to seek recourse from the 1st defendants, it must request the 1st defendants to repurchase these 'Purchase Debts' under clause 13 of the Factoring Agreement.

g Clause 13 of the Factoring Agreement provides particularly that in the event of non-recovery of the 'Purchase Debts', the 1st defendants must repurchase them from the plaintiffs together with certain charges levied by the

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plaintiffs. However, these mandatory repurchases must be by way of written notice from the plaintiff to the 1st defendants. From the affidavits in support of this application for Order 14, I find no such written notice tendered by the plaintiffs to the 1st defendants requiring the 1st defendants to repurchase the 'Purchase Debts'. When there is no such repurchases, these 'Purchase Debts' are the legal properties of the plaintiffs and the 1st defendants are not liable in the event of non-recovery.

The plaintiffs argued in addition to and in the alternative, that they have recourse against the 1st defendants, for non-recovery of these 'Purchase Debts' under clause 12 of the Factoring Agreement. Clause 12 of the Factoring Agreement for the sake of clarity is reproduced as follows -

**12. WARRANTIES, RECOURSE AND
CONVENANTS**

- (a) Every contract arising from our acceptance of any offer made by you to sell us any Debt will be deemed to include the following warranties given by you:-
 - (i) that the contract between you and your Customer under which the debt arises is valid and enforceable according to its terms;
 - (ii) that you have fully performed your obligations under any agreement giving rise to the debt and that the debt has not been disputed by the Customer and is a *bona fide* obligation of the Customer to you and arises in the ordinary course of your business;
 - (iii) that the amount payable by the Customer in respect of the debt will not be less than that of the Purchase Price of the Debt;
 - (iv) that the Customer is not and will not be entitled to any counterclaim, set-off or defence against you in respect of the Debt and that you do not know and would not on reasonable enquiry know of any facts likely to lead to any such counterclaim, set-off or defence;
 - (v) that we shall under the contract obtain a good unencumbered title to the debt, subject to no prior sale, assignment, transfer or encumbrance;

a (vi) that the customer from whom the debt is owing has not sought to repudiate or rescind the contract;

b (vii) that you have not agreed with the customer for any extension of the contractual time for payment of the debt or for any waiver or modification of the terms of contract except as provided for in this agreement;

c (viii) that all information, reports and other papers and data furnished to us (including details in every offer submitted by you under Paragraph 1 hereof) are accurate and correct in all material respects and complete;

d (b) If there be any breach of any of the above warranties in relation to any purchase debt you will reimburse us with the excess of any part of the Purchase Price, paid to you in relation to such debt plus the factoring charge over the amount paid to us by the customer.

e ...covenant and agree in such contract for the sale of a debt to us that you will not without our prior written consent at any time sell, assign, transfer or recumber any Debt purchased under such contract other than to or in favour to us.

f After careful perusal of each and everyone of these warranties and covenants, I find no evidence from the affidavits in support of the plaintiffs' application for Order 14, that, the 1st defendants had breached any of these warranties and covenants. Such being the case, the 1st defendants are not obliged to reimburse the plaintiffs on the non-recovery of the 'Purchase Debts'.

g The next contention of the plaintiffs is that of 'no forbearance or indulgence' or 'any waiver' by the plaintiffs to the 1st defendants under the Factoring Agreement would exempt the 1st defendants from any liabilities to the plaintiffs. Again from the affidavits filed in support of the plaintiffs' application under Order 14, I find no forbearance or indulgence or waiver was ever granted by the plaintiffs to the 1st defendants. This is particularly so when the 1st defendants had not breached any of the warranties and covenants. Further, how can there be any forbearance or indulgence or waiver by the plaintiffs when they themselves have not exercised their legal right of request to the 1st defendants to repurchase the 'Purchase Debts'.

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I shall now refer to the plaintiffs' contention that under clause 10 of the Factoring Agreement; an unquestioned Statement of Accounts, tendered by the plaintiffs to the 1st defendants each month, should be deemed accurate and conclusive of an amount which, the 1st defendant must immediately pay to the plaintiffs. In support of this contention, the plaintiffs referred to various statements exhibited in the plaintiffs' affidavits filed in support of the application for Order 14. Further, the plaintiffs' counsel cited the then Federal Court judgement of Justice Raja Azlan Shah (as he then was) in *Citibank N.A. v. Ooi Boon Leong* [1981] 1 MLJ 282, where it was ruled obiter that, when a clause in an agreement contains a provision whereby a certificate of indebtedness by an officer of one party of money and liabilities for the time being due or incurred, can be conclusive evidence of such indebtedness.

In order to determine this point, a careful perusal of clause 10 of the Factoring Agreement is necessary. Clause 10 begins by stating that, "We may maintain such accounts as we may consider appropriate convenient to record these transaction". The term 'these transactions' are not defined anywhere in clause 10. However, if one reads the preceding clause 9, it would be clear that 'these transactions' would mean 'purchase debts' that might have been paid in from the 1st defendants' customers to the 1st defendants instead of to the plaintiffs and, 'purchase debts' specifically requested by the plaintiffs of the 1st defendants to collect on its behalf.

The statement of accounts described in clause 10 must be in reference to these aforesaid arrangements. These aforesaid arrangements have nothing to do with the non-recovery of any 'Purchase debts' by the plaintiffs. As such, the certificate of indebtedness from the plaintiffs' credit administration manager has no relevance and connection with the plaintiffs' claim which, based on the exhibits attached to the plaintiffs' affidavits in support is for a recourse against the 1st defendants for non-recovery of the 'Purchase Debts' by the plaintiffs.

Based on the aforesaid, I find that there are sufficient triable issues which would warrant

a a dismissal of the Order 14 application by the plaintiffs. I need not even proceed to the other contention of the 2nd to 6th defendants on the variation of the Factoring Agreement by an Invoice Discounting Agreement. The first ground is sufficient for me to allow this appeal with costs.

b I therefore order that this appeal be allowed with costs and that the plaintiffs' application for summary judgment against the 2nd to 6th defendants be dismissed with costs.

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